

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

TERRY MALIN,)	
Defendant,)	
)	
v.)	I.D. # 0608022475B
)	
)	
STATE OF DELAWARE.)	

Date Submitted: Motion for Postconviction Relief: June 30, 2008
Date Submitted: Motion for New Trial: November 14, 2008
Date Decided: March 4, 2009

OPINION

Defendant's *Pro Se* Motions for Postconviction Relief and New Trial - **DENIED**.

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Ferris Wharton, Esq. and J. Brendan O'Neill, Esq., Assistant Public Defenders, State Office Building, 820 North French Street, Wilmington, DE 19801

Terry Malin, Defendant, James T. Vaughn Correctional Center, 1181 Paddock Road, Smyrna, DE 19977

Jurden, J.

I. INTRODUCTION

Terry Malin (“Defendant”) filed a *pro se* Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”) on June 30, 2008. Defendant filed a *pro se* Motion for New Trial pursuant to Superior Court Criminal Rule 33 (“Rule 33”) on November 14, 2008. For the reasons set forth below, Defendant’s Motions for Postconviction Relief and New Trial are **DENIED**.

II. BACKGROUND

On September 20, 2007, Defendant was found guilty by a jury in the Superior Court of one count of Robbery First Degree and two counts of Robbery Second Degree. He was sentenced on the First Degree Robbery to a mandatory three years Level V KEY with credit for 42 days previously served. He was sentenced on the first count of Second Degree Robbery to one year Level V, suspended for six months Level IV CREST, followed by six months Level III. He was sentenced on the second count of Second Degree Robbery to one year Level V, suspended for one year Level III probation.¹ Defendant timely appealed his convictions and the Supreme Court affirmed on June 17, 2008.² Thirteen days later, Defendant filed a Motion for Postconviction Relief pursuant to Rule 61 in which he asserts eight grounds for relief. These grounds can be summarized into five arguments: (1) ineffective assistance of counsel; (2) insufficient evidence to

¹ Sentence Order, Docket Item (“D.I.”) 10; *Malin v. State*, 954 A.2d 910, 2008 WL 24291114, at *1 (Del. June 17, 2008) (TABLE).

² *Malin*, 2008 WL 24291114, at *1.

support conviction; (3) violation of his *Miranda* rights; (4) irregularities in the indictment; and (5) juror bias.³

In Defendant's Motion for New Trial, filed on November 14, 2008,⁴ his grounds for relief are: (1) juror bias; (2) ineffective assistance of counsel; (3) competency to stand trial; and (4) Defendant's right to subpoena New Castle County Police Officer Corporal Pursey and Delaware Psychiatric Center Nurse Marion Osbourne.⁵

III. DISCUSSION

A. Motion for New Trial

Prior to addressing the substantive merits of Defendant's Motion for New Trial, the Court must first determine whether Defendant has met the procedural requirements of Rule 33.⁶ If the procedural requirements are not met, in order to protect the integrity of the procedural rules, the Court will not consider the merits of the claim. Rule 33 states:

A motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment . . . A motion based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.⁷

³ Def.'s Motion for Postconviction Relief ("Postconviction Motion"), D.I. 18.

⁴ Def.'s Motion for New Trial, D.I. 25.

⁵ *Id.* at 1.

⁶ Super. Ct. Crim. R. 33.

⁷ *Id.*

Pursuant to Rule 33, the Defendant has until November 16, 2009 to file a Motion for New Trial based on new evidence. His right to file a Motion for New Trial for any other reason expired on November 23, 2007.

Because none of Defendant's claims involve newly discovered evidence, they are subject to the seven-day period, not the two-year period. Defendant's November 14, 2008 Motion for New Trial is therefore procedurally time-barred under Rule 33. For purposes of completeness, however, this Court will consider the claims asserted in Defendant's Motion for New Trial as amendments to his Motion for Postconviction Relief under Rule 61.⁸ If treated as such, those claims were timely filed pursuant to Rule 61(i)(1).⁹

B. Motion for Postconviction Relief

Before addressing the merits of Defendant's Postconviction Motion, the Court must determine "whether the petition meets the procedural requirements of

⁸ The Delaware Supreme Court explains:

a defendant may use Rule 61 to seek a new trial even if such a motion would be time barred under Rule 33 . . . a defendant who seeks a new trial under Rule 61 must understand, however, that his or her claim will be subject to all of the provisions of Rule 61, including the bars to relief.

Downes v. State, 771 A.2d 289, 292 (Del. 2001). In *Downes*, the defendant filed a motion for a new trial based on newly discovered evidence that would have been untimely under Rule 33, but not yet barred under Rule 61. *Id.* The Court was willing to entertain Defendant's claim under Rule 61 because Rule 61 is broader in scope. *Id.*

⁹ A postconviction motion that is filed more than one year after judgment of conviction is procedurally time-barred. Super. Ct. Crim. R. 61(i)(1). For the purposes of this rule, a conviction is final thirty days after sentencing, unless a direct appeal is filed in that time frame. R. 61(m)(1). In the event of a direct appeal, conviction is final when the Supreme Court issues a final order. R. 61(m)(2). Defendant was sentenced on November 16, 2007, and filed a direct appeal to the Supreme Court. The Supreme Court issued its final order on June 17, 2008, affirming the judgment of the Superior Court. *Malin*, 2008 WL 24291114, at *1. Defendant's Motion for New Trial was submitted on November 14, 2008, which was within the statutory period, and therefore not procedurally time-barred under Rule 61(i)(1).

Rule 61.”¹⁰ This Court will not address the Defendant’s claims if they are procedurally barred. In Rule 61(i), the following procedural bars to relief are set forth:

- (1) Time limitation. A motion for Postconviction relief may not be filed more than one year after the judgment or conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment or conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.
- (2) Repetitive Motion. Any ground for relief that was not asserted in a prior Postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.
- (3) Procedural Default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows
 - a. Cause for relief from the procedural default and
 - b. Prejudice from the violation of the Movant’s rights.
- (4) Former Adjudication. Any ground for relief that was formerly adjudicated, whether the proceedings leading to the judgment of conviction, in an appeal, in a Postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.¹¹

1. Insufficient Evidence to Support Conviction

Defendant asserts that there was insufficient evidence to support his convictions because he was never identified by Ms. Wilson or by the surveillance

¹⁰ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

¹¹ R. 61.

tape. He also asserts that the other surveillance tape does not clearly show a robbery or corroborate Ms. Howard's or Mr. Moore's testimony.¹²

The Delaware Supreme Court has ruled on this claim, finding it “without merit,” and therefore it is procedurally barred as formerly adjudicated under Rule 61(i)(4). The Supreme Court noted that Ms. Wilson identified the Defendant in court as the person who robbed her, and that the police found clothing, matching that worn by the suspect in the surveillance video, in the Defendant's car.¹³ The Supreme Court held that: “[Defendant's] contention that Mary Wilson was not the victim of a robbery because there was no threat of force is meritless. Even though the robbery note contained no express threat, it did contain an implied threat of force.”¹⁴ Defendant does not meet the “interest of justice” exception because he has not offered any evidence or argument that the exception is applicable. Defendant has not raised any new issues to support his claim of insufficient evidence, and it is therefore **SUMMARILY DISMISSED**.

¹² Postconviction Motion at 1.

¹³ *Malin*, 2008 WL 24291114, at *1-3.

¹⁴ *Id.* at 3.

2. The Defendant's *Miranda* Rights

Defendant claims that he was never read his *Miranda* rights and that this “violated [his] rights.”¹⁵ This claim was also formerly adjudicated by the Delaware Supreme Court and does not meet the “interest of justice” exception to Rule 61(i)(4). The Supreme Court ruled that this claim is without merit and thus it is **SUMMARILY DISMISSED**.¹⁶

3. The Defendant's Indictments Contained Irregularities

In his Postconviction Motion, Defendant questions the legitimacy of the Court's proceeding and hearings and its ability to “properly construct charges and cases.”¹⁷ He claims that his indictment contained irregularities because there was an improper name on one of the indictments, and a charge was added without “proper procedures in direct violation of due process.”¹⁸ The Supreme Court has already ruled on this claim, which makes it procedurally barred by Rule 61(i)(4). The Supreme Court held that, pursuant to Superior Court Criminal Rule 12(b)(2), any objections to the form of an indictment are waived if they are not made before trial. Defendant did not object prior to trial, thereby waiving his right to raise this objection at a future date.¹⁹ Defendant's claim does not meet the “interest of

¹⁵ Postconviction Motion at 4.

¹⁶ *Malin*, 2008 WL 24291114, at *2.

¹⁷ Postconviction Motion at 4.

¹⁸ *Id.*

¹⁹ *Malin*, 2008 WL 24291114, at *2.

justice” exception to Rule 61(i)(4), and is therefore procedurally barred and **SUMMARILY DISMISSED.**

4. Juror Bias

Defendant claims he knew one of the jurors that convicted him, a person by the name of Raymond Porter. Defendant claims that Mr. Porter was a corrections officer at Sussex Correctional Institute in Georgetown and worked there while Defendant was incarcerated there in 2005. Defendant also claims that his attorney told him that it might be a good thing that he knew a juror, and that he had no more strikes available to dismiss Mr. Porter from the jury.²⁰

This Court will not address the substantive merits of this claim because it is procedurally barred under Rule 61(i)(3). This issue was never raised in the proceedings leading up to Defendant’s conviction, including his direct appeal. Furthermore, Defendant has not demonstrated cause or prejudice that would exempt him from the procedural default. Even if this claim was not procedurally barred, the Court notes that, according to trial counsel, Defendant never informed counsel that he knew Mr. Porter.²¹ Nor did Mr. Porter acknowledge knowing Defendant during *voir dire*.²² Defendant’s claim is therefore **DISMISSED.**

²⁰ Postconviction Motion at 3.

²¹ Resp. to Postconviction Motion, D.I. 22.

²² *Id.*

5. Competency to Stand Trial

Defendant claims that “he is no longer heavily sedated with medication and can now prepare a valid case to a jury.”²³ He offers no argument or evidence for his claim that he was incompetent at the time of trial due to medications.²⁴ Defendant did not raise this issue in the course of his trial proceedings or his direct appeal. Thus, this claim is procedurally barred.²⁵ Defendant has not demonstrated cause or prejudice that should exempt him from the procedural default. However, the bar to relief under Rule 61(i)(3) does not apply to a claim involving a “miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.” Further analysis is therefore required because due process and the integrity of the judicial proceedings “require that a defendant be competent to stand trial.”²⁶

Defendant fails to demonstrate that he was incompetent to stand trial in September 2007. It is Defendant’s burden of proof to establish that he is entitled to postconviction relief due to a “miscarriage of justice.”²⁷ Defendant does not offer any evidence suggesting an inability to “consult with his lawyer with a reasonable

²³ Motion for New Trial at ¶C.

²⁴ *See Id.*

²⁵ R. 61(i)(3).

²⁶ *State v. Shields*, 593 A.2d 986, 1005 (Del. Super. 1990) (citing *Pate v. Robinson*, 383 U.S. 375 (1966)).

²⁷ *Jackson v. State*, 1995 WL 439270, at *3 (Del. Super. July 19, 1995).

degree of rational understanding” or an inability to understand the proceedings against him at trial.²⁸

To the contrary, the record reflects that Defendant was competent to stand trial. At the request of defense counsel, the Court postponed Defendant’s two trials²⁹ so that Defendant could undergo a psychiatric evaluation.³⁰ The purpose of the examination was, among other reasons, to “assist the Court in its determination of competency to stand trial. . . .”³¹ Pursuant to the Court’s order, Defendant was evaluated by psychologist Robert G. Thompson, Psy.D. Dr. Thompson concluded that:

[Defendant] demonstrated that he has the knowledge, skills and abilities for meaningful participation for his defense. Also, he demonstrated that he can collaborate with his attorney. Therefore, it is my opinion, within a reasonable degree of psychological certainty, that he is **competent to stand trial**.³²

Dr. Thompson’s examination and professional opinion as to Defendant’s competency to stand trial are consistent with Delaware standards.³³ Defendant was able to explain the charges against him, his legal options, the role of the

²⁸ *Shields*, 593 A.2d at 1005 (outlining the standard for determining competency) (citing *Dusky v. United States*, 362 U.S. 402 (1960) and 11 *Del. C.* § 404(a)).

²⁹ Prior to trial, Defendant’s charges were severed. D.I. 5. In December 2007, in the severed, companion trial, Defendant was found guilty of one count of Attempted Rape in the First Degree, Assault in the First Degree, Burglary in the Second Degree, Robbery in the First Degree, and four counts of Possession of a Deadly Weapon During the Commission of a Felony. *Malin v. State*, 2008 WL 4358718, at *1 (Del. Sept. 24, 2008). On direct appeal, Defendant raised nearly an identical claim regarding his competency to sit for trial as he presents here. *Id.* The Supreme Court found that his claim of being “under the influence of ‘psychiatric medication’ at the time of trial” was inconsistent with the trial transcripts and “without merit.” *Id.* at *3.

³⁰ *Malin*, 2008 WL 24291114, at *2.

³¹ Report of Robert G. Thompson, Psy.D. at 1, dated May 7, 2007, D.I. 15.

³² *Id.* at 8.

³³ See *Shields*, 593 A.2d 986.

prosecuting attorney versus the role of his defense attorney, and the potential consequences of his trial.³⁴ The Court is satisfied that the “miscarriage of justice” exception has not been met and, consequently, Defendant’s claim is **DISMISSED**.

6. Entitlement to Subpoena Witnesses

Defendant claims he is entitled to relief because he was unable to subpoena New Castle County Police Officer Corporal Pursey and Delaware Psychiatric Center Nurse Marion Osbourne. Defendant’s claim is conclusory. He does not offer any facts that support this claim and would justify relief. Furthermore, this claim was not asserted in any proceeding “leading to the judgment of conviction,” and Defendant does not show cause or prejudice from a violation of his rights.³⁵ This claim does not survive the procedural filter of Rule 61(i)(3) and is **SUMMARILY DISMISSED**.

7. Ineffective Assistance of Counsel

Defendant claims in his Motion for Postconviction Relief and Motion for New Trial that his trial attorneys provided ineffective assistance of counsel. Defendant claims that there was a conflict of interest with the Public Defender’s Office because of an issue he had with Ms. Van Amerongen, an assistant public defender. Defendant asserts that because his trial attorneys, Mr. Wharton and Mr. O’Neill, worked for the Public Defender’s Office and were co-workers with Ms.

³⁴ *Id.* at 6-8.

³⁵ R. 61(i)(3).

Van Amerongen, it “opened the door for prejudice and unfundamental fairness of trial,” limited his defense, and cause him “unwarranted stress and anxiety.”³⁶ Defendant further claims that he asked counsel to file several pre-trial motions to suppress evidence and other unspecified pre-trial motions which counsel did not do.³⁷

Defendant’s ineffective assistance of counsel claim is not procedurally barred because a Rule 61 motion is the appropriate vehicle for such a claim, even when it has not been previously raised.³⁸ The Court’s analysis of an ineffective assistance of counsel claim is governed by the two-part test set forth in *Strickland v. Washington*.³⁹ Under *Strickland*, the defendant must show that (1) counsel performed at a level “below an objective standard of reasonableness,” and (2) “the deficient performance prejudiced the defense.”⁴⁰ The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show “that there is a reasonable probability that, but for defense counsel’s unprofessional errors, the result of the proceeding would have been different.”⁴¹ The defendant must make concrete allegations of actual prejudice, and substantiate them or risk summary

³⁶ Postconviction Motion at 1.

³⁷ *Id.* at 3-4.

³⁸ See *Reynolds v. Ellingsworth*, 843 F.2d 712, 723 (3d Cir. 1988), *cert. denied*, 488 U.S. 960 (1988); *Malin*, 2008 WL 24291114, at *3.

³⁹ 466 U.S. 668 (1984).

⁴⁰ *Strickland*, 466 U.S. 668.

⁴¹ *Id.* at 687-88, 694.

dismissal.⁴² There is a “strong presumption” that counsel's representation was professionally reasonable.⁴³

Here, Defendant fails to set forth any allegations upon which the Court could find either prong of *Strickland* satisfied. He makes no argument that defense counsel’s representation fell below an objective standard of reasonableness or that, but for defense counsel’s alleged substandard representation, the result would have been different. Defendant describes his relationship with Ms. Van Amerogen, Mr. Wharton, and Mr. O’Neill as unpleasant.⁴⁴ However, Defendant fails to explain why his attorneys’ actions were deficient and how their alleged deficient performance probably altered the outcome of his trial. Defendant’s claim is therefore **DISMISSED**.

IV. CONCLUSION

For the above-mentioned reasons, Defendant’s Motion for Postconviction Relief and Motion for New Trial are hereby **DENIED**.

IT IS SO ORDERED.

Jan R. Jurden, Judge

⁴² *State v. Donohue*, 2008 WL 5206779 (Del. Super. Dec. 4, 2008).

⁴³ *Salih v. State*, 962 A.2d 257, 2008 WL 4762323, at *1 (Del. Oct. 31, 2008) (TABLE).

⁴⁴ Motion for New Trial; Postconviction Motion at 1; Defense Counsel’s Resp. to Def.’s Postconviction Motion. The Court denied her request and held that Defendant had not forfeited his right to a public defender. *Id.*